528.

SUPREME COURT OF THE UNITED STATES.

No. 137.

BENJAMIN RUPERT, ASSIGNEE IN BANKRUPTCY OF E. M. BISSELL, APPELLANT,

vs.

TIMOTHY DAVIS.

IN ERROR TO THE SUPREME COURT FOR THE TERRITORY OF IOWA.

INDEX.

	Original.	Print.
Transcript from district court	1	2
Bill of complaint	2	2
Defendant's answer	22	11
Exhibit No. 1	36	17
" No. 2	37	17
Decree of district court	38	18
Appeal granted—appeal bond	39	18
Clerk's certificate	41	19
Assignment of errors	42	20
Affidavit of Thomas Rogers	53	25
" A. Thomas	55	25
Statement of E. M. Bissell	58	27
Opinion of Supreme Court	61	28
Decree " "	66	30
Appeal prayed	67	31
Certificate of clerk of district court	67	31
Affidavit of complainant	68	31
Appeal granted	70	32
Appeal bond	71	33
Clerk's certificate	72	33
Citation and service	73	34

J. & G. S. Gideon, printers.

An appeal from a decree of the district court of Dubuque county.

UNITED STATES OF AMERICA,
Territory of Iowa, ss:

Pleas held before the honorable Charles Mason, chief justice, and Joseph Williams and Thomas S. Wilson, associate justices of the supreme court in and for the Territory of Iowa, on the 5th day of January, A. D. 1844.

BENJAMIN R. PETRIKEN, assignee of Elijah M. Bissell, complainant, against TIMOTHY DAVIS, defendant. } In chancery.

Be it remembered, that heretofore, to wit, on the 17th day of January, A. D. 1843, the complainant, by his solicitor, A. Thomas, esq., filed in the clerk's office of the supreme court in and for the territory aforesaid, the following transcript of the record and proceedings had between the parties in the district court of Dubuque county, to wit:

Transcript.

Pleas before the honorable Thomas S. Wilson, associate judge of the supreme court of Iowa, and judge of the third judicial district of Iowa, holden in the city of Dubuque, at the November term, in the year of our Lord one thousand eight hundred and forty-two.

Witness THOMAS S. WILSON, *Judge*.
WARNER LEWIS, *Clerk*.
GEO. W. CUMMINS, *Sheriff*.

Bill of complaint.

TERRITORY OF IOWA, *Dubuque county, ss:*

Be it remembered, that on the 11th day of May, A. D. 1842, Benjamin R. Petriken, assignee of Elijah M. Bissell, by his attorney, A. Thomas, filed in the office of the clerk of the district [court] for the county of Dubuque aforesaid, his bill of complaint, in the words and figures following, to wit:

IOWA TERRITORY, *Dubuque county, ss:*

District court in and for said county, May term, A. D. 1842. In chancery.

To the honorable Thomas S. Wilson, presiding judge of the third judicial district in and for said territory, complaining, Benjamin Rush Petriken, of said county, assignee of Elijah M. Bissell, of said showeth unto your honor, that the said Elijah M. Bissell, on or about the 9th day of February last past, filed his petition in the clerk's office

of this court, to be declared a bankrupt under and by virtue of the bankrupt law of the United States, approved August 19th, 1841; that on or about the 7th day of March, one thousand eight hundred and forty-two, before this honorable court, the said Elijah M. Bissell was duly declared a bankrupt in accordance with the prayer of said petition. At which time your petitioner was appointed assignee of all and singular the estate and effects of the said bankrupt; all which matters are now of record in this honorable court, on the bankrupt side thereof.

Your petitioner would further state, that as he is informed and believes, the said Elijah M. Bissell, on *on* or about the second day of August, one thousand eight hundred and forty-one, made a voluntary assignment for the benefit of his creditors of his estate and effects to one Timothy Davis, esq., of the same place, which said assignment is to the following effects, that is to say:

An indenture made and concluded this second day of August, 1841, between Elijah M. Bissell, of the city of Dubuque, in the county of Dubuque, in Territory of Iowa, of the first part, Timothy Davis, of the county aforesaid, of the second part, and the several *other* persons whose names and seals are hereunto subscribed and fixed, creditors and sureties of the said Elijah M. Bissell, of the third part; whereas the said Elijah M. Bissell is at present unable to pay his just debts, and hath agreed to assign and convey all his estate, real and personal, and mixed, subject to all lawful incumbrances now existing thereon, unto the said Timothy Davis, in trust, for the benefit of the creditors of the said Elijah M. Bissell, in manner herein mentioned.

Now, this indenture witnesseth, that the said Elijah M. Bissell, in consideration of the premises, and one dollar paid him by the said Timothy Davis, the receipt whereof is hereby acknowledged, doth hereby grant, sell, bargain, assign, and convey, unto the said Timothy Davis, his heirs and assigns, all the said Elijah's right, title, and estate, in any lands and tenements, situate in the said Territory of Iowa; also all his right *right* and interest in all goods and chattels, books of account, merchandise, debts, and sum and sums of money in any way due and owing or belonging unto the said Elijah M. Bissell, and all sureties had and taken and obtained for the same; to have and to hold the same, with the appurtenances, to the said Timothy Davis, his executors, administrators, and assigns; upon this special trust, nevertheless, that the said Timothy Davis shall forthwith take possession of the premises, and within such convenient time as to him shall seem meet, by public or private sale, for the best price that can be procured, and shall convert all and singular the rights, title, and estate in said premises, hereby conveyed, into money, collect all and singular the debts, and sum and sums aforesaid, and after deducting the costs and charges of the trust before mentioned, shall pay and *apply* the moneys arising therefrom in manner following; that is to say, in the first place, to pay and retain to imburse himself such costs, charges, and expenses, as he shall sustain or expend in and about such sales, so to be made as aforesaid, or in collecting the debts and sums of money mentioned, to be hereby assigned as aforesaid, and the expense of preparing and executing, and all other

costs and charges and expenses incident to the execution of the trusts herein *expended, and* also to pay and reimburse and indemnify the said Timothy for all his liabilities which he has incurred for the said Elijah M.; and also for the trouble and time spent in the execution of the trusts herein *expended*. In the second place, out of the surplus, if any remains, to apply the same in discharge of an execution in favor of Jones, Bacon & Co., against the said Elijah M., for the stay of which the said Timothy has signed a bond; and also in discharge of all judgments heretofore recovered in the district court for the county of Dubuque against the said Elijah M., which are now standing against him; and also to pay and satisfy Benjamin Rupert and Samuel D. Dixon all expenses and trouble they may be put to by reason of their having heretofore executed bonds for the stay of executions on said judgments; and also to indemnify and see harmless the said Benjamin Rupert for all costs, damages, trouble, and expense to which he may be subjected to by reason of his having signed and sealed bonds for the said Elijah M., in a suit now pending *in* favor of John Maguire, against the said Elijah M. In the third place, out of any further surplus that may remain to pay and discharge the following described debts and liabilities, to wit, to Baker and Cox for rent of house, as per lease, to John Thompson for rent of store, to P. S. Dade, for bills of costs, to pay all debts due and outstanding against the said Bissell, or Bissell & Co., for goods heretofore sold on commission, a particular schedule of which is to be hereunto annexed as soon as conveniently may be; a balance due to , of Dayton, Ohio, of about two *hundred* dollars, to M. Lane on a note now in suit about $140, a note due to Black and McCane of about $160, a note to J. J. Demit of about fifty-eight dollars; whatever may be due to P. Evans on settlement, balance may be due to C. H. Evans for labor; also to pay and discharge all demands which the said Bissell now owes to any person in said territory; provided, however, that the last item above mentioned is not to extend to any demand above one hundred dollars. In the fourth place, to pay and indemnify A. Bissell, *of* Pittsfield, of Massachusetts, for having signed a bond with the said Elijah M. to E. Richmond, of the estate of Giles Necker, on which is due about seven hundred dollars. In the fifth place, to pay and discharge the following demands, now in the hands of Davis & Crawford for collection, to wit, a note due Colborn and Coolidge, of about one hundred and sixty dollars; notes due to Wales, Nelson & Co., on which is due about fifteen hundred dollars; a note to E. & A. Tracy, on which is due *about* nine hundred dollars; and also a note due T. G. Reyburn & Co., on which is due about four hundred dollars; also a balance, if any shall be found due, to James Lyman & Co. on settlement. In the sixth place, after paying and discharging all of the foregoing named charges and demands, should there be any further surplus, to pay and discharge any balance that may be found due A. F. Robinson, of Cincinnati, on settlement; any balance that may be found Eleazor Hills, of Auburn, New York, on a note, and to Elisha Alvord, of New York. Seventhly, if there should be any further surplus remaining, after discharging the foregoing de-

mands and liabilities, to pay a note due to A. M. Bennett, of St. Louis; and also a note due to D. F. Brigbain, of St. Louis, for the sum of one hundred dollars; and also to pay and discharge all other judgments of all persons against the said Bissell, or so much thereof as said surplus will pay; and lastly, should there be any surplus, after paying and discharging all demands aforesaid, then the same is to be returned to the said Elijah M. And the said Elijah M., in furtherance of these premises, doth hereby make, constitute, and appoint the said Timothy his true and lawful attorney, irrevocable in his name or otherwise, and upon and for the trusts aforesaid, to ask, demand, recover, and receive of and from all and every person and persons, all and singular the goods and chattels, wares and merchandise, sum and sums of money, due, owing, and belonging to him in any way, as the said Elijah might do if these presents had not been made; and upon all receipts and delivery in the premises due discharges in his name *or* otherwise to make, execute, deliver, and acknowledge; and in default of delivery or payment in the premises, to sue and prosecute and implead for the same, and to compromise and agree for all or any part thereof, as he may seem meet; and upon such composition or other agreement to make due discharges; also for all or any of the purposes aforesaid, to constitute one or more agent or agents, attorney or attorneys under him, the said Timothy, hereby giving and granting to his said attorney and his substitute, full power and authority in the premises to do all things necessary *and* proper, for the full and complete execution of the trusts aforesaid. There is expressly understood to be excepted from this conveyance such household goods, chattels, and furniture, as the law would allow to the said Elijah as exempt from execution; also two notes of one thousand dollars each, signed by J. D. Doty, F. O'Neal, and James Morrison, payable to Peyton Vaughn, and by him endorsed, which said notes are to be delivered to the order of Marcus Wilbar & Son, of New York, as they are their property. And the said Timothy doth covenant and agree to use all diligence *in* endeavoring to bring to a close the trusts in this deed contained for the benefit of all concerned, according to the best of his skill and judgment, and to account for all that may come into his hands, and be received by him by virtue of these premises, to those concerned.

In witness whereof, the said parties hereto have set their hands and seals, the day and year aforesaid.

ELIJAH M. BISSELL, [SEAL.]
TIMOTHY DAVIS. [SEAL.]

In presence of—
JAMES CRAWFORD.
CHESTER WALBRIDGE.

And your petitioner would further state, that the deed of assignment above *named* is now in the hands and possession of the said Timothy Davis, assignee as aforesaid; and he prays that the said Davis may be ruled to produce the same here in court; and when produced, he prays further that the same may be made a part of this bill.

And your petitioner would further state he is informed and believes, that on or about the same day of the execution of the aforesaid instrument by the said Bissell and Davis, the said Elijah M. Bissell made and executed another deed of assignment for the benefit of his creditors, to the following effect, *that* is to say: This indenture entered into this 2nd day of August, 1841, by and between Elijah M. Bissell and Julia V., his wife, of the one part, and Timothy Davis, all of Dubuque, in the Territory of Iowa, witnesseth; that whereas the said Elijah M. is indebted to divers persons in divers sums of money, which he is at present unable to pay. Now, for the purpose of securing the payment of the same, and for and in consideration of the sum of five dollars to him in hand paid, the receipt of *which* is hereby acknowledged, he hath granted, bargained, sold, conveyed, and assigned, and by these presents doth hereby grant, bargain, sell, convey, and assign, to the said Timothy, the following described real estate situate in the Territory of Iowa aforesaid, to wit, one undivided half of the west half of the northeast quarter of section No. 30, in township No. 8 north, of range 4 west, of the fifth principal meridian; also the following town lots in the town of Dubuque, to wit, lots No. 541, 559, 660, 661, 478, and 662, all of the interest of the said Elijah, in lots 159, 659, Peter A. Lorimier holding the bond of the said Elijah to parts of these three lots which is to be satisfied, lots No. 665 and 407, and part of lot No. 45, deeded to said Bissell by C. H. Booth; also lots 447*a* and 468*a*; also the undivided half of a tract of land situate in the bottom, near *town* of Dubuque, claimed jointly with one George Carmon; also whatever interest the said Bissell has in a lot of mineral ground, which he now works with Antoine Sore, it being merely a working interest in said lands. To have and to hold the said described lands and real estate to him, the said Timothy, his heirs and assigns, forever, subject to the trusts expressed in a deed of assignment from the said Elijah to the said Timothy of this date. ELIJAH M. BISSELL, [SEAL.]
TIMOTHY DAVIS. [SEAL.]

In presence of—
JAMES CRAWFORD.

And your petitioner would state, that as he is informed and believes the said instrument above *named* referred to is in the possession and under the control of the said Timothy Davis, and he prays that the said Davis may be ruled to produce the same here in court, and when produced that the said deed may be made a part of this bill.

Your petitioner would further state, that in pursuance of such assignment set forth and referred to above, the said Timothy Davis, the assignee therein named, took possession of the goods, rights, and credits of the said Elijah M. Bissell; that the goods, drugs, medicines, and merchandize, then being and remaining in the *store* occupied by the said Bissell, were continued there by the said assignee and one J. P. Evans, clerk for said Bissell, in said store, up to the time of said assignment; and the said Bissell were in possession of said store, selling goods, set-

tling the accounts, and collecting the debts of said concern, from the time of the assignment, until some time in the latter part of August, when the said Bissell left the store in the care of the said J. P. Evans, on a journey to the State of Massachusetts, and *returned* on or about the first of November following. During the absence of the said Bissell, the said J. P. Evans remained in the store, and transacted the business thereof. And your petitioner would further state, that on or about the first of December last past, the said Davis, as assignee, sold and delivered to the said J. P. Evans, all the dry goods still remaining in said store, and included under said assignment, for two thousand two hundred forty-one dollars and forty cents, or thereabouts, the original costs of which goods was two thousand eight hundred and eighty-two dollars and forty cents, or thereabouts. In payment of which said goods, the said assignee received from the said Evans certain promissory notes, executed by the said Evans and endorsed by one M. H. A. Evans, now deceased, late of the firm of Evans & Watkins, of this city, merchants, to wit, one note payable six months after date, for five hundred sixty dollars and forty-five cents, or thereabouts; one note payable nine months after date for eight hundred forty dollars and forty-seven cents, or thereabouts; and one note payable at twelve months from date, for *eight* hundred forty dollars and forty-eight cents, ($840.48,) as by said notes will more fully and at large appear. And your petitioner would further state, that said notes are now in the possession of the said Timothy Davis; he therefore prays that the said Davis may be ruled to produce said notes here in court, to await the direction of your honor.

And your petitioner would further state, that before the sale *of* of said goods by the said assignee to the said Evans, and on the eve of such sale, the said Elijah M. Bissell, *assignor* in said instrument, above named and referred to, in a conversation with the said Davis in relation to such contemplated sale, objected to the same, because of inadequacy of price; second, because the responsibility of the maker and endorser of said paper or notes, was not such as to justify the sale on those terms, that is, the terms of payment; third, because the terms of sale were not in accordance with the authority given to the said Davis as assignee, under and by virtue of the deeds of assignment above named and *referred* to, that is to say, that the terms of such sale were not cash or ready money, as required by said deeds of assignment; and that said assignor made a sale of said goods as aforesaid to said J. P. Evans, contrary to such objections of said assignor, and contrary to the provisions of the aforesaid assignments.

And further, that the said Timothy Davis has received to his own use, in goods and cash out of the aforesaid goods and merchandize assigned as aforesaid, more than one hundred dollars, as by the bills of sale and credits will more fully appear. And your *petitioner* would further state, that, as he is informed and believes, immediately upon the sale of the goods and merchandize as aforesaid, to said Evans as aforesaid, he, the said Evans, left the store aforesaid, and removed the goods and merchandize so as aforesaid purchased from the said assignee, into

another store in said city of Dubuque, from which time said Bissell remained in possession of said store; and the goods and merchandize remaining unsold, including drugs, medicines, paints, and other species of merchandize, he, the said Bissell, making sales, settling accounts, and collecting debts and transacting *the* business up to or about the 9th of February last past; that on or about the 22d of December last past, the said Davis, or one James Crawford, as his agent, rented another store, for the purpose and uses of the remaining goods and merchandize, to which they were removed; that the rent for said store, as well as for the former one, after the assignment, has been paid out of and charged to such assigned property and estate, and that said store was, until by said Davis *expressly* for the uses and benefit of the trusts committed to *him* by such assignment, and for no other uses or purposes whatsoever.

And your petitioner would further state, that on the ninth of February last past, the said Bissell filed his petition to be declared a bankrupt, under and by virtue of the bankrupt law of the United States; and that proceedings have been had thereon as above stated and set forth; which said petition, and the schedules thereto annexed or accompanying, now being among the records of this court, on the bankrupt side thereof, he prays for liberty to refer to them, should such reference at any time be necessary for the purpose of this bill.

Your petitioner would further state, that from and after the time of filing the petition as aforesaid by the said Bissell, as he is informed and believes, the said Bissell took possession of, and held adversely to said Davis, of all and singular the remaining goods, effects, merchandize, book accounts, and other property, included under the aforesaid assignment, except the aforesaid notes of J. P. Evans, and a note of one George W. Jones, of Wisconsin Territory, for $270 34, or thereabouts, by refusing *to* deliver possession of the store, wherein said drugs, medicines, and other merchandize and effects were lodged, to the said Timothy Davis, up to and until or about the fifth day of March last past, when the said Davis took possession thereof by a violent and forcible entry into said store, by breaking open a window and door thereof; and that after a decree of bankruptcy against the said Bissell, and after the appointment of your petitioner assignee as aforesaid, by an agreement by and between your petitioner and the said Davis, assignee as aforesaid, your petitioner took *charge* of said goods and effects, safely to keep, without prejudice to either party, to wit, to your petitioner, as assignee, under and by virtue of the bankruptcy, or to the said Davis, as assignee as aforesaid, until the further order and decree of this honorable court. And that in the mean time your petitioner, by such agreement, is to collect the debts, settle the accounts of the estate of said bankrupt, and do all things necessary to the speedy and complete settlement of the same; he is further informed and *believes*, that a short time previous to the filing of the petition of the said Bissell, he, the said Bissell, consulted with the said Davis as to the expediency of his application for the benefit of the bankrupt law of the United States; that the said Davis counselled him to take the benefit of said law, in which case he, the

said Bissell, desired that nothing further might be done on the part *of* of said assignee.

And your petitioner would further state, that, as he is informed and believes, the deed of assignment first above set forth and referred to was, after its execution by said Bissell and Davis, and before the filing of the petition aforesaid by the *said* Bissell as aforesaid, was also signed and executed by Benjamin Rupert and Samuel D. Dixon, of Dubuque, Iowa, who had before that *time* executed bonds to stay executions on several judgments obtained against the said Bissell in the district court for said county; the amounts of such judgments, and to whom each belong, more fully and at large appear by the records of this court, to which said records your petitioner prays leave to refer.

And further, that soon after the said deed of assignment was executed by Thompson and *McCune*, judgment creditors of the said Bissell, that it was also executed by other creditors of the said Bissell, as by said deed of assignment will more fully and at large appear; but as your petitioner is informed, not to exceed, in all, nine hundred dollars in amount of debts.

And your petitioner well hoped that the said Timothy Davis would have given quiet and peaceable possession of all and singular the goods, merchandize, accounts, debts, and effects of said bankrupt, into the possession, care, and keeping of your petitioner, as such assignee; but he, the said Davis, hath neglected and refused, and still does neglect and refuse, so to do. In consideration whereof, and for as much as your petitioner cannot have an adequate and complete remedy at law, but only in a court of equity; to the end, therefore, that the said Davis may, to the best of his knowledge, belief, and information, full, true, direct, and perfect answers make to all and singular the matters aforesaid, and more especially set forth more particularly at what time he, the said Davis, executed said deeds of assignment; at what time the said Benjamin Rupert and Samuel D. Dixon executed the same, and for what purpose. For what amount, if any, they and each of them were bound and held responsible for the debts and liabilities of said Bissell; to whom such debts and each of them were due, and the amount of each and all; whether such debts were or are in judgments, when and where such judgments were obtained. What other creditors of said Bissell have executed said deeds of assignment; at what time each and every of them executed the same; whether individually, or by attorney; if by attorney, set forth the power to execute said deeds; *whether* the same were executed before or subsequent to the act of bankruptcy above referred to; the amount of each demand, and when due; whether in judgment; if so, when and where the same were obtained. State the aggregate demands of all those executing the same. At what time he, the said Davis, made a sale of the goods and merchandize belonging *to said* to the said J. P. Evans; what the aggregate original cost of said goods; at what price he sold the same to said Evans; what payment he received; if paper, what *may* be its character; whether bonds, bills of exchange, promissory notes, or other security; if either or any,

give a description of each, the amount, when and where, and to whom payable, and by whom executed and endorsed; whether at the time, or a little previous, the said Bissell did not object to such sale; first, because the price was not sufficient or adequate to the value of the goods; second, because the purchaser was not sufficiently responsible; third, because such sale was not in accordance with the provisions of the assignment; whether the store to which the residue of the *goods* were removed was not rented by him expressly and only for the uses of the assignment; whether the rent for the same was not paid out of or charged to said estate; whether he did not forcibly enter into and upon said store, and the manner the same was effected; whether the said Bissell did not consult with him upon the expediency of him, Bissell, availing himself of the bankrupt law of the United States; and whether he did not advise and counsel him to do so; whether said Bissell did not inform him, that he desired in *that* case that nothing more should be done under the assignment to himself; what property, goods, notes, book accounts, or other property, now remain in his possession, independent of the arrangement between himself and your petitioner; what other sales have been effected by him or by his direction. Give a detailed account of all the acts and transactions of him, said Davis, as assignee, since he came into the possession of the goods and estate of the said Bissell. And that the said Timothy Davis may be made defendant in this bill, and decreed by this honorable court to surrender up to your *petitioner* all and singular the monies, goods, merchandize effects, book accounts, and evidence of debt of every kind and description whatever, belonging to the estate of the said Elijah M. Bissell, that came into his possession and control under and by virtue of the aforesaid assignment. That he may set forth specially each and every sale, transfer, or other disposition of any part or portion of said property, since the same came into his possession and control as aforesaid, and account for the same. That he may true answer make to all and singular the allegations and interrogatories above set forth. Your petitioner asks, that a writ of summons may issue out of and under the seal of this honorable court, to be directed to the said Timothy Davis, personally to be and appear before this honorable court, and then and there full, true, direct, and perfect answers make to all and singular the premises; and further, to stand to, perform and abide whatever order, direction and decree therein as to your honor shall seem meet and proper. And that your petitioner may have such other and such further relief in the premises, *as* shall be necessary to carry out the objects and purposes of said assignment to your petitioner, under and by virtue of said bankrupt law of the United States. And your petitioner shall ever pray, &c.

B. RUSH PETRIKEN,
Assignee of E. M. Bissell.

On the back of which said bill of complaint is the following endorsement, to wit:

Filed in open court, this 3d day of May, 1842.

PHIL. S. DADE, *Cl'k D. C.*

And now, on the 4th day of May, A. D. 1842, being a term of said court, the following proceedings were had in the words and figures following, to wit:

BENJAMIN R. PETRIKEN, assignee of E. M. Bissell,
vs.
TIMOTHY DAVIS, assignee of E. M. Bissell, under voluntary assignment.
} Bill in chancery.

Continued.

And now at this day, come the parties by their solicitors, and this cause is continued to the next term of this court.

And now on this day, to wit, the 11th day of May, A. D. 1842, the said Timothy Davis, the respondent, filed his answer to said bill in the words and figures following, to wit:

Timothy Davis's answer.

The answer of Timothy Davis to the petition of Benjamin Rush Petriken, assignee of Elijah M. Bissell, presented against him in the district court of Dubuque county, I. T.

This defendant, for answer to the said petition, or to so much thereof as he is advised it is necessary or material for him to make answer to, he answereth and saith: that he admits it is true that the said Elijah M. Bissell filed his petition in this court to be declared a bankrupt, and that such proceedings have been thereupon had as the said petitioner has stated in his petition, and that the said petitioner has been appointed assignee of the said Elijah M. Bissell, as stated in said petition.

This defendant admits that the said Elijah M. Bissell, on the 2nd of August, 1841, made an assignment to him of his goods and effects, in trust for the use and benefit of his creditors, as is in said deed of assignment expressed, and he believes the same are correctly set forth in said petition; but if they are not, this defendant has the original deeds in his possession, ready to be produced and referred to as this court may direct; and when so produced, he prays the same may be taken and considered as a part of this his answer.

And this defendant further states, that at the time of said assignment, to wit, on the said 2nd day of August, 1841, immediately upon the execution of said deeds of assignment, he took possession of all the property mentioned and specified in them. That the key of the house containing the household furniture, as also the store, with all belonging to the same, was delivered to him, and that he placed the store immediately in the custody and charge of J. P. Evans, as clerk for him, and the books of the store were immediately opened in his name, as assignee of said E. M. Bissell; and all the business, settlement of accounts, and collections and taking of notes, were in his name, as assignee as aforesaid, as far as this defendant is informed and believes. That instructions were given to said Evans to do all the business in the name of this

defendant, not only by this defendant, but by the said Elijah M. Bissell; and that the said Evans was instructed to bring the said business to a close as fast as possible, to effectuate the objects of said deeds of trust.

This defendant further states, that he requested said Bissell to aid and assist, by his advice and personal services, in so disposing of the property belonging to said concern, and assigned as aforesaid to this defendant, and in settling the accounts and collecting the dues of the concern as would best promote and advance the interests of those concerned; and that the said Bissell promised so to do, and did assist to some extent to that end.

This defendant further answering states, that from the time of executing said assignment as aforesaid, the said store and goods were in the possession exclusively of this defendant, as assignee as aforesaid. That the business was conducted in this defendant's name, as assignee as aforesaid; and that the said Elijah M. Bissell and J. P. Evans, or either of them, had no possession, custody, or control of the same, except as the agents and clerks of this defendant.

This defendant further answering states, that the statement in said petition, that "one J. P. Evans, clerk for said Bissell in said store, up to the time of said assignment, and the said Bissell were in possession of said store, selling goods, settling the accounts, and collecting the debts of said concern, from the time of the assignment until some time in the latter part of August, when the said *Bissell left the store in the care* of J. P. Evans," is not true, except in the sense stated in the last above paragraph of this answer; and that if the said Bissell or Evans transacted any business of said concern, otherwise than as the agents and clerks of this defendant, it was in fraud of the rights of this defendant, and in violation of their duty to this defendant, and a gross breach of the trust reposed in them by this defendant; and this defendant further states, that when said Bissell left for the East, in the latter part of August, as stated in said petition, the store was not left by him in the care of said J. P. Evans, but that the said store was placed by this defendant in the care of said J. P. Evans, and he had the custody and charge of the same, not from said Bissell but from this defendant, and under him. This defendant further answering says, that he admits that he sold to the said J. P. Evans the dry goods and some other articles in said store, as is stated in said petition, and for the sum stated in said petition, and has taken the promissory notes for the payment of the same, and endorsed as stated in said petition; what the original cost of said goods was, this defendant is unable to state.

The bargain that he made with said Evans was, that he should take the stock of dry goods on hand at seventy-five per upon their cost, and some other articles at a greater per cent. upon their cost, as he now thinks, and the said Evans agreed to take them at that rate, and he believes the invoices of said goods were made out, and the prices charged for them accordingly. This defendant further states, that said bargain for the sale of said goods was made in the full hearing and understanding of said Bissell; that said Bissell made out the accounts and

calculation of the amount of said goods, and drew the notes given in payment for the same. This defendant admits, that at the time of said sale the said Bissell objected, and insisted that the price for which said goods were sold was not enough, but made no other objection whatever to said sale; and this defendant expressly denies that said Bissell objected to said sale on account that the maker and endorser of the notes given for said goods were not responsible, or that said sale was not in conformity with the deed of assignment, or was not for ready money.

This defendant further states, that at the time said Bissell left this place on a visit to the East, as stated in said petition, he represented to this defendant, and also to said Evans, that [he] expected to be able to obtain at the East means to pay the debts due by him, and to release his property here from the deeds of assignment which he had executed to this defendant; and that in order to enable him to do so, this defendant did not proceed so promptly to dispose of said goods as he probably otherwise would have endeavored to have done; that when the said Bissell returned, as he has stated in his said petition, without being able to raise the means to satisfy his creditors and release his property from the deeds of assignment to this defendant, this defendant then represented to said Bissell, and also to said Evans, the necessity of endeavoring to make immediate sale of the stock remaining on hand, for the purpose of satisfying said deeds of assignment, and of so disposing of them as to make them produce the greatest amount for the creditors of said assignment; and no other mode presented for so doing, but either to make a sale of them in the lump, or to auction them off; the latter mode was considered inadvisable, as there were many articles in said stock of goods that would not be saleable at auction, and to adopt that mode of disposing of them was considered as likely to result in almost a total loss of their value. The said Bissell agreed with this defendant, that it would be much better to attempt a sale of them upon time, and a negotiation was entered into for that purpose with the said J. P. Evans, and he made the offer upon which they were finally sold to him, as hereinbefore stated.

This defendant further expressly states and charges, that after the highest terms were obtained from said Evans, which he would give for said goods, this defendant told said Bissell if any person could be found who would give more, or if a better sale could be effected, he was anxious to make it, and desired said Bissell to obtain a purchaser; but being unable to do so, and no other offer being made, the terms of said Evans were closed with, and said Evans and Bissell made a bill of said goods according to said terms, and notes for the payment of the same were taken as hereinbefore stated, which notes this defendant has ready to be produced, as may be directed by the court.

This defendant further states, that he consulted with Samuel D. Dixon, of the city of Dubuque, respecting the eligibility of said sale to said Evans upon the terms proposed by him; and said Dixon expressed to this defendant his opinion, that said sale was one that ought to be satisfactory to all concerned; said Dixon had previously been employed by

this defendant to assist to make out the invoice of said goods, shortly after the making of said deeds of assignment, and did assist in making out an invoice of them; and being a merchant of considerable experience, and well acquainted with the situation of things here in Dubuque, and a competent judge of such matters, this defendant placed much confidence in his judgment and opinion. This defendant states that said stock of dry goods embraced the residuum of several years dealing; that the assortment was much broken; that many of said goods had been laid in when prices were much higher than goods of the same description could be purchased at at the time of said sale; that many of the articles were unsaleable articles, and had suffered injury, and were imperfect; he believes the said sale to said Evans was eligible, and under the circumstances was the best thing that could have been done for the creditors. After the sale of said goods as aforesaid, there yet remained on hand the residuum of the stock of drugs and medicines; this defendant was anxious to dispose of them. He instructed and requested the said Bissell to endeavor to do so, and the said Bissell informed this defendant that he had applied to Dr. Finley, of Dubuque, to purchase them; this defendant also proposes to said Finley to make an offer for said drugs and medicines, but no bargain was effected with said Finley for that purpose; said Bissell also represented to this defendant that a person by the name of Risley, living in the northeastern part of Illinois, a relation and acquaintance of said Bissell, would purchase, or join said Bissell in purchasing said drugs and medicines, and requested that the same might be retained on hand until the said Risley could come to Dubuque.

That in order to effect such sale, this defendant, by the advice of said Bissell, rented the house where the said drugs now are, and caused them to be removed to said house. This defendant further states, that after the sale of said dry goods to said Evans, the said Bissell remained in the said store, having the custody and charge of what remained therein as this defendant's clerk or assistant, as this defendant understood, to assist in closing said concern, settle the accounts, and collect the debts, and under and by reason of the request made to him at the time of said assignment, that he should so assist and give his personal services in aiding to bring said concern to a close, as this defendant understood; and this defendant was utterly ignorant (until hereinafter stated,) of said Bissell's *settling* up any claim to said goods, or any thing appertaining to said concern, in opposition to or against said assignment. This defendant further states, that some time after the removal of said drugs, &c., as hereinbefore stated, the said Risley arrived at this place, and was referred by said Bissell to this defendant to make a purchase of said remaining drugs and medicines; that said Risley applied to this defendant for that purpose, but not being able to raise the means, or for some other cause not known to this defendant, he failed to close any purchase of the same while here, but left a message with said Bissell, as said Bissell informed this defendant, to the effect, that upon his return home he would endeavor to make arrangements to effect said purchase, of which said Bissell in-

5357

formed this defendant; and this is the last this defendant has heard of said Risley.

This *petitioner* further answering states, that some time early in March last, as near as he can recollect, he required from said Bissell the key of the store, when said Bissell first pretended to this defendant to set up some claim or pretence that this defendant was not entitled to the possession thereof as assignee aforesaid, and refused to deliver the same to him; whereupon this defendant, to get into said store, opened a window shutter and hoisted a window, and went into the same, and took into personal charge said store and contents, as he well believes he had good right to do, as of his own property, and retained the same until the agreement made with said petitioner set forth in his petition.

The defendant expressly states, that the refusal of said Bissell to give to him the key of said store as aforesaid, was the first intimation he had of any claim being set to the same by said Bissell, or any other person in opposition to this defendant. This defendant also demanded and required from said Bissell, at said time, a full account of all the transactions by him, said Bissell, which had been had while he was so acting in it as aforesaid, which said Bissell has hitherto wholly neglected and refused to make out or furnish to the present time.

This defendant denies that said Bissell ever took possession of said store, or held the same adversely to him, except as aforesaid; and insists that, from the time of the assignment and delivery to him as hereinbefore set forth, the same has been and is still in his legal custody and possession.

This defendant further states, that he has no recollection of the said Bissell ever consulting with him respecting his, said Bissell's, taking the benefit of the bankrupt act, nor has this defendant ever given the said Bissell any advice to his recollection respecting the same; this defendant recollects that, being in said store one evening, he made the observation to said Bissell that he, this defendant, did not see how said Bissell was to pay his debts without taking the benefit of said act, or words to that effect; to which, as near as this defendant recollects, said Bissell replied, he "guessed not," and also observed, if he should be compelled to resort to that course, it would be best to be as still as possible, or something to that effect; and what said Bissell meant by said last mentioned observation, this defendant did not understand at the time. The observation of this defendant was a mere casual observation, and he has no recollection of any other conversation with said Bissell on the subject of his application for the benefit of the bankrupt law; and so far from said Bissell's consulting with, or taking counsel from, this defendant on the subject of his application for the benefit of the bankrupt act, this defendant believes he avoided so doing or making this defendant acquainted with his intention for applying for the same.

For answer to the several interrogatories in said petition contained, this defendant states, that he executed said deed of assignment at the time of its date; that said Rupert executed the same shortly after its

date, as he thinks; that Samuel D. Dixon has never executed the same; that Black and McCune, O. H. Evans, H. Warbridge for A. F. Robinson, and J. P. Evans, signed the same previous *previous* to the application of said Bissell to be declared a bankrupt; that the rest of the creditors who have signed, have signed the same since the application of said Bissell to be declared a bankrupt; and he knows of no further authority for said signatures than what appears on the face of the deed.

This defendant is not aware of being able to make a more correct description of debts due by said Bissell than is contained in said deed of assignment; that he believes the time of the sale of the goods from this defendant to said Evans is correctly set forth, as also the amount and payments to be made, and by whom, and the security taken for such payments. As to said Bissell's objecting to said sale, he refers to his former statement herein for an answer thereto. That said store was rented, and payment or charges for said rent made, as stated in said petition. As to his entering said store, he refers for answers thereto to his former statement herein; as also to said Bissell's consulting him as to his, said Bissell's, applying for the benefit of the "bankrupt act."

As to goods, accounts, &c., remaining in his possession, he believes a full account thereof, as of any sales or collections made by this defendant, will be found on the books of said concern, now in the custody of the petitioner, as stated in his petition.

And he further answering, states, that at the date of said deeds of assignment, there were in his, and his partner, James Crawford, hands for collection, notes on said E. M. Bissell in favor of Waters, Nelson & Co., and E. & A. Tracy, of St. Louis, as described in exhibits hereto annexed, as No. 1 and 2, to which said Bissell had agreed to enter his appearance to declarations to be filed on them at the last August term of this court, as by said exhibits will appear; that upon said assignments being made, no further proceedings were taken on said notes, and immediate information given to the holders of said notes of taking said assignment, in securing the payments of them; and that said E. & A. Tracy, and *Wales*, Nelson & Co., were immediately informed of said assignment, and approved of the same, and assented thereto. Also, the note mentioned in said deed of assignment to Colburn & Coolidge of about $160, and that said Colburn & Coolidge approved of said assignment, and assented thereto. Also, the note to J. S. Demit of about fifty-eight dollars, that the agents of said Demit also approved of said assignment, and assented thereto; and this defendant further states, that the main consideration which induced him to accept of said assignment and act as trustee, was to secure the claims of the persons placed in his and his partner's hands for collection, and that these persons approved of the course thus taken by this defendant; that T. G. Rayburn, of the firm of T. G. Rayburn & Co., mentioned in said assignment, was here at the city of Dubuque, and was informed thereof, and gave this defendant to understand he should expect his part out of said assignment. Without this, that there is any other matter or thing in said petitioner's petition contained, not herein and hereby well and sufficiently answered

unto, confessed and *worded*, traversed or that is true; and he prays hence to be dismissed with his costs, &c.

TIMOTHY DAVIS.

The above named Timothy Davis states that the matters and things contained in the foregoing answer, so far as stated from his own knowledge, are true; and so far as stated from information of others, he believes them to be true.

TIMOTHY DAVIS.

Signed and sworn to before me, this 11th May, 1842.

PHIL. S. DADE, *Clk D. C.*

Exhibit No. 1.—*(Exhibit No. 1.)*

1841. *Bissell & Co., to E. & A. Tracy*, Dr.

April 1st. To your note of this date, due sixty days after date, with interest after due at the rate of ten per cent. per annum until paid, for the sum of $899 29.

We hereby appoint and authorize Timothy Davis, our attorney in fact and at law, to enter our appearance to a suit, to be entered on the above note, to the next August term of the district court of Dubuque county, in Iowa Territory, and which suit, when the declaration is filed with the clerk of said court, is to stand precisely in the same condition as though suit was regularly brought on the same, by suing out process in the ordinary way at this time. Witness our hands at Dubuque, this 22nd July, 1841.

E. M. BISSELL,
For himself, and
JOHN SHAW,
Composing the late firm of Bissell & Co.

Exhibit No. 2.—*(Exhibit No. 2.)*

1839. *Bissell & Co., to Wales, Nelson & Co.* Dr.

April 11th. To your note of this date, due six months after date, for $731 90, with interest at ten per cent. from maturity until paid; on which said note is credited, 1839, Sept. 18th, cash per W. Holcomb, $400.

1840, July 8th. To your note of this date, due one day after date, and with interest from maturity at the rate of ten per cent. per annum, for the sum of 923\frac{37}{100}$.

Sept. 8th. Your note of this date, due on the 15th November after date, payable at Miners' Bank, for the sum of $425 82.

We hereby authorize and appoint Timothy Davis, our attorney in fact and at law, to enter our appearance to a suit, to be entered on the above notes, to the next August term of the district court of Dubuque county, in Iowa Territory, and which suit, when the declaration is filed with the clerk of said court, is to stand precisely in the same condition as

though suit was regularly brought on the same by suing out process in the ordinary way at this time.

Witness our hands at Dubuque, this 22nd July, 1841.

E. M. BISSELL,
For himself, and
JOHN SHAW,
Composing the late firm of Bissell & Co.

On the back of said answer are the words and figures following, to wit: "Filed in open court the 11th day of May, 1842.

PHIL. S. DADE, *Clk. D. C.*"

At another time of said court, to wit, on the 24th day of November, in the year of our Lord one thousand eight hundred and forty-two, the following proceedings were had, and are in the words and figures following, to wit:

BENJAMIN R. PETRIKIN, assignee of Elijah M Bissell, vs. TIMOTHY DAVIS. } In chancery.

Final decree.

And now at this day came the parties aforesaid, and the court being sufficiently advised concerning the matters and things contained in the petition and answer in this cause, and of the testimony given in the case on the trial, do find that the two deeds of assignment, executed by the said Elijah M. Bissell to Timothy Davis, of the 2d of August, 1841, set forth in the petition, were made upon a good and valuable consideration, and are sufficient in law for the purposes therein specified, and vest all the right, title, claim, and interest of the said Elijah M. Bissell to the goods, property, and effects, also to the lands and tenements therein mentioned, in the said Timothy Davis, according to the terms of said deeds; and that the said Benjamin R. Petrikin has no right or claim to said property in said deeds mentioned, except such part as may remain after satisfying all the trusts in said deeds mentioned.

It is therefore ordered, adjudged, and decreed by the court, that the said petition be dismissed, and that the said Timothy Davis have and recover of the said plaintiff his costs about his suit in this behalf expended, and that execution issue therefor. Thereupon the said complainant, by his solicitor, prayed the court to grant him an appeal to the Supreme Court, which is granted on the condition the said plaintiff enter into bond with sufficient security, according to law.

On the 2d day of January, A. D. 1843, the said complainant filed in the office of the clerk of said district court his appeal bond, which is in the words and figures following, to wit:

Appeal bond.

Know all men by these presents, that we, Benjamin Rush Petrikin, assignee of Elijah M. Bissell, a bankrupt, as principal, and Benjamin Rupert, as security, all of the county of Dubuque, and Territory of Iowa, are held and firmly bound unto Timothy Davis, of the same

place, in the penal sum of five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, to the said Timothy Davis, his executors, administrators and assigns, we jointly and severally bind ourselves, our executors and administrators, firmly by these presents. Now, the condition of this obligation is such, that whereas a suit was commenced in the May term of the district court in and for said county, for 1842, on the chancery *term* thereof, by the said Benjamin Rush Petrikin, as assignee of the said Bissell, against the said Timothy; and also at the November term of said court, A. D. 1842, a decree was entered against the said plaintiff and his bill, with costs; whereupon the said plaintiff appealed to the supreme court of said territory. Therefore, if the said Benjamin Rush Petrikin shall well and truly pay, or cause to be paid, to the said Timothy Davis, on demand, all costs that may be awarded to the said Timothy Davis in the above mentioned suit, and shall on demand deliver *deliver* up to the said Davis the goods, drugs, medicines, book accounts, and all other evidences of debt in said case, and shall account with the said Davis for all matters and things involved in said suit, should the said supreme court decide against the said Petrikin, then this obligation to be void, otherwise to be and remain in full force. In witness whereof, the said parties of the first part have hereunto set their hands and seals, this second day of January, one thousand eight hundred and forty-three.

"B. RUSH PETRIKIN, [SEAL.]
By A. THOMAS, *his attorney*.
"BENJ. RUPERT." [SEAL.]

Signed and sealed in presence of—
E. M. BISSELL.

Clerk's certificate.

TERRITORY OF IOWA, *Dubuque county, ss:*

I, Warner Lewis, clerk of the district court for the said county of Dubuque, do hereby certify, that the foregoing is a true, correct, and full transcript of all the files, records, and proceedings in the above entitled cause, wherein Benjamin Rush Petrikin, assignee of Elijah M. Bissell, is complainant, and Timothy Davis is defendant.

In testimony whereof, I have hereunto set my hand, and affixed the [SEAL.] seal of said court at Dubuque, the 3rd day of January, A. D. 1843.

WARNER LEWIS, *Clerk D. C.*

Endorsed, "Filed January 17th, 1843."
Teste: GEO. S. HAMPTON, *C. S. C.*

On the said 17th day of January, A. D. 1843, the complainant, by his solicitor, filed in the clerk's office of the supreme court the following assignment of errors to wit:

Assignment of errors.

IOWA TERRITORY, *Dubuque county, ss:*

B. R. PERTIKIN, assignee of E. M. Bissell, bankrupt, &c.
vs.
TIMOTHY DAVIS, assignee, &c.

Supreme court in and for said territory, January term, A. D. 1843, in chancery. An appeal from the district court in and for said county.

To the honorable the supreme court of said territory:

The petition and appeal of Benjamin R. Petrikin, of said county, assignee of Elijah M. Bissell, of the same place, a bankrupt, by A. Thomas, his solicitor, showeth unto this honorable court, that on or about the 11th day of May last past, the said p aintiff filed his bill on the chancery side of the district court, in and for said county, the Hon. Thomas S. Wilson presiding, against Timothy Davis, the above named defendant; to which said bill of complaint the said defendant filed his answer; and thereupon said cause was brought to a hearing, before his honor Thomas S. Wilson, in the term of May, A. D. 1842, when the testimony of Elijah M. Bissell was taken in open court; which said testimony was commented upon, and used by the said plaintiff in the trial and argument of said cause. And, also, the said plaintiff prayed in his said bill of complaint that the said defendant be ruled to produce*d* in open court certain deeds of assignment, purporting to have been executed for the benefit of creditors, on the 2d day of August, A. D. 1841, which said deeds of assignment are mentioned and referred to in the plaintiff's bill; which said deeds were produced by the said defendant, and used by the said plaintiff on the trial thereof. That said plaintiff also prayed, that the said defendant be ruled to produce*d* in open court certain notes executed by one J. P. Evans, and endorsed by one M. A. H. Evans; that thereupon the said defendant did produce said notes in open court, and the same were referred to as matter of evidence, on the trial and argument of said cause, by the plaintiff's counsel.

The said plaintiff would further state, that the testimony of one James Crawford was also taken in open court on the part of the said defendants, which said testimony was also used by the said plaintiff on the trial of said cause. That said cause was brought to a hearing in the said term of May, and thereupon the court took the same under advisement, until the November term of said court, A. D. 1842; when, among other things, that the bill of complaint of said plaintiffs against the said defendant, should stand dismissed out of said court with costs, and that the said plaintiff should take nothing thereby; and the said decree has been duly passed and entered of record in said court.

And your petitioner would further state, that he apprehends he is aggrieved by the said decree, for that his honor hath dismissed his said bill of complaint against the said defendant; whereas the plaintiff is advised, and submits, that the said bill of complaint ought not to have been dis-

missed, but that according to the case made out by the said plaintiff at the hearing of the said cause, the said plaintiff ought not to have been entitled to relief sought by his said bill of complaint, and also to a decree in accordance with the same.

He would further state, that the demand he, as assignee of the said Elijah M. Bissell, has against the said defendant, and which was embraced in said bill of complaint, exceeds the sum of twenty-five dollars, exclusive of interest, costs, and all set-offs, and other demands whatever. And in support of his said several allegations, he therefore prays leave of this honorable court to assign the following as causes of error, in the decree of his honor in the court below, to wit:

First. It appears, from the record and evidence in this case, that the assignment was made for the following purposes, to wit. First, to prevent one Isaac Burnet, a creditor of said Bissell, from attaching the property of Bissell.

Second. To screen the property of said Bissell in the hands of the assignee during an indefinite period of time, for the benefit of the assignor, and until he could avail himself of foreign assistance from his friends or otherwise.

Third. That the assignee might the more effectually secure his own demands against the assignor.

Fourth. The assignee might secure the demands of certain clients of his own, (creditors of said Bissell's,) to the prejudice and injury of other creditors, preferred before them in the deed of assignment, contrary to the express provisions of the same, and contrary to the covenant and undertaking of said assignee, contained in the deed of assignment, and in violation of his duty as assignee; therefore said assignment is wholly fraudulent and void, as against the creditors of said Bissell under the bankrupt law, and as against his creditors independent of that law.

Second. It appears, by the record and evidence, that the personal property mentioned in the plaintiff's bill was not taken into *actual* possession by the assignee, nor was said deed recorded as by the statute is required.

Third. It appearing, from the record and testimony, that said deeds of assignment, being made not in consideration of the purposes therein expressed, but to subserve other objects and purposes not expressed, and the money consideration being wholly and totally inadequate, therefore said deeds of assignment, being without an adequate and valuable consideration, the same *is* fraudulent and void.

Fourth. If said assignment to the said Davis be valid at all, it is valid only so far as the personal property is involved and conveyed; because it appears, from an inspection of said deeds of assignment, that the real estate was conveyed by one deed, but the power to sell, and the trusts thereof, are contained in the other, which latter is not recorded, as by the statute is required; hence, as to the real estate, said assignment is a nullity, and therefore void.

Fifth. That said deed of assignment first mentioned in the plaintiff's bill of complaint being composed of three parts, each individual of the

third part must execute the same, before he can claim any thing under its provisions.

Sixth. If individuals, being creditors and sureties of said Bissell, may come in and execute said deed of assignment at any time subsequent to the said 2d of August, 1841, then said deed of assignment is not a "deed of assignment" duly executed, as to each individual designated, until he signs and seals the same, in accordance with its provisions, (for each must execute the same before he can take under it;) and when each does so execute the same, it is the joint and simultaneous act of the respective parties of the three parts; hence any execution of said assignment, subsequent to the 19th of August, 1841, will be void, because inconsistent with the provisions of the bankrupt law of the United States approved on that day, which directs that all creditors shall share "pro rata" in the effects of the bankrupt.

Seventh. Any execution of said assignment, or assent thereto, subsequent to the time said Bissell filed his petition to be declared a bankrupt, is inconsistent with the bankrupt law of the United States, which provides that all the creditors of the bankrupt shall share "pro rata" in his property, without any priority or preference, &c.

Eighth. It appears from the record and assignment, that at the time said Bissell filed his petition to be declared a bankrupt, he, the said Bissell, had some valid and subsisting interest in the property included under the assignment to the said Davis. By the bankrupt law, such interest, whatever it may be, *must* pass into the hands, and become vested in the assignee of the bankrupt, for the benefit of creditors, like other property, subject to any valid and subsisting lien.

Ninth. If the property vested at all in the said assignee, under and by virtue of the assignment, it vested in him only for the purposes of the trusts therein contained, and for no other purposes whatever; therefore, if said assignment were void, or was subsequently revoked in any manner, said trusts must be void or fail, as the case might be, and the property would again revert to the assignor, or his legal representative.

Tenth. The said Timothy Davis was appointed, and constituted attorney in fact, by said deed of assignment, only to execute the trusts therein specified; hence, if said assignment were never legally and fully executed, or was void ab initio, or revoked, at any time subsequent to the said 2d of August, 1841, then such power of attorney must follow and abide the fate of said assignment, whatever that may or might be.

Addenda. That the fact of the said assignee being appointed attorney in fact, or in fact and law, to execute the trusts contained in said deeds of assignment, is not a power coupled with an interest, or *such* a power coupled with an interest, as renders and vests an irrevocable interest in the assignee in the property in question.

Eleventh. It appears from the testimony before the court below, that about the last of January, or first of February, A. D. 1842, said Bissell revoked said assignment, by directing and instructing the said assignee therein to proceed no farther under said assignment; that said Bissell

took and held adverse possession of the property embraced in the assignment, or a large proportion of it, from that time; and that when the said assignee demanded possession of the same from the said Bissell, he, the said Bissell, refused to deliver possession thereof to the said Davis, alleging that he, the said Bissell, had revoked said assignment to him, and that he, said Davis, had then more money in his hands and possession than was sufficient to pay and discharge the liabilities that he had incurred in consequence of said assignment; therefore, if said assignment be valid at all, it is valid only so far as it had been executed by individuals of the third part previous to such revocation.

Twelfth. It appears of record that said Bissell filed his petition to be declared a bankrupt, under the provisions of the law of Congress, approved August 19th, 1841, in the office of the clerk of the United States district court of said county, on the bankrupt side thereof, on the 9th day of February, A. D. 1842; by which act, and by the operation of law, from and after that time, said assignment to said Davis became and was revoked, so that no subsequent execution of said assignment or assent thereto could be binding or effectual.

Thirteenth. It also appears of record, that said Bissell was duly declared a bankrupt on the 7th day of March, A. D. 1842, and that said plaintiff was then appointed assignee of the estate, goods, and effects of said bankrupt, and therefore said assignment became and was revoked by operation of law, and the property previously held by said assignee vested absolutely in the said bankrupt assignee, by the express provision of the bankrupt law, for the benefit of the creditors of said Bissell.

Fourteenth. It appears by an inspection of said deed of assignment first mentioned and referred to in plaintiff's bill of complaint, that said assignment was executed by Wales, Nelson & Co., or *Woles*, Nelson & Co., by one of the firm; hence, said firm can claim nothing by such execution, because copartners can only execute deeds and indentures individually, and not in the partnership name, unless the member so executing the same has a special power of attorney to do so from each individual composing the firm. It also appears, that said firm did not execute the same until subsequent to the time said Bissell filed his petition to be declared a bankrupt; hence, if their execution would have been valid at all in this case, it is void, because inconsistent with the provisions of the bankrupt law.

Fifteenth. It also appears from an inspection of the deed of assignment first referred to in plaintiff's bill of complaint, that one Wolbridge executed the same for A. F. Robinson, and it does not appear from said deed or record or evidence, nor in fact did he have any authority from said Robinson, nor indeed did said Robinson know of such execution; hence the same is void and of no effect as to said Robinson.

Sixteenth. It also appears from the record and evidence, that whatever other execution of said deed of assignment by the creditors of said Bissell, subsequent to Robinson by Wolbridge, the same was subsequent to the time the said deed of assignment was revoked by the act of said Bissell, or by operation of law.

Seventeenth. That said deeds of assignment are inoperative and void, because said property has never been reduced to possession by said assignee, as required by the same, nor has a schedule been made out and attached to said assignment, or in accordance with the express provisions of the deed of assignment first above referred to in the plaintiff's bill of complaint.

Eighteenth. It appears of record, that costs were awarded against the said plaintiff by the decree and judgment of the court below.

"Adenda" 1st. Said assignment is void ab initio and "in toto," because inconsistent with the provisions of the bankrupt law, which requires and provides that all the creditors shall share pro rata in the effects of the bankrupt.

Adenda 2d. Said assignment is not a "lien" upon the estate or effects of the said bankrupt, within the provisions, meaning, or intent of the bankrupt law; therefore, the same is revoked by the operation of said law.

Adenda 3d. That said assignment is void, because creditors will not be permitted, by an undue or *extraordinary race* of diligence, to acquire an undue *mastery* or preference, or priority of payment out of the assets, to the prejudice of the rights of the other creditors; much less shall any creditor be allowed to assume the character of assignee, or other fiduciary character, to acquire that undue *mastery*, preference, or priority.

Adenda 4th. That said power of attorney contained in the deed of assignment is void, because said deed containing the same is not recorded, as by the statute is required.

Adenda 5th. That all the property and rights of property, contained and included under said assignment, comes into the hands and possession of the assignee, by the provisions of the bankrupt law.

Adenda 6th. That said assignment was made, and the preferences therein given, in anticipation of the passage of a bankrupt law, and therefore the same are void.

Your petitioner therefore appeals from the said decree of his honor, and submits the above exceptions to this honorable court, and prays of this honorable court that said decree, dismissing the bill of complaint of the said plaintiff may be reversed, and that your petitioner may be declared to be entitled to relief against said defendant, in the manner and form sought by his said bill of complaint; or that this honorable court will make such further or other order and decree, touching the premises, as shall be right and proper.

And your petitioner shall ever pray, &c.

A. THOMAS, *Solicitor*
For B. R. PETRIKIN, *Assignee, &c.*

Endorsed, filed, January 17, 1843.
Teste: GEO. S. HAMPTON, *C. S. C.*

And afterwards, to wit, on the 10th day of May, A. D. 1843, the said complainant, by his solicitor, filed herein the affidavits of Thomas Rogers, esq., and A. Thomas, esq., as follows, to wit:

Affidavit of Thomas Rogers, esq.

IOWA TERRITORY, *Dubuque county, ss:*

B. RUSH PETRIKIN, assignee of E. M. Bissell,
vs.
TIMOTHY DAVIS, assignee, &c.

Personally appeared before me, Warner Lewis, clerk of the district court in and for said county, Thomas Rogers, who being duly sworn says, that he is associated with A. Thomas, as attorney for the plaintiff in this cause; that being informed by said Thomas that there was some difference of opinion as to the testimony taken therein, and that he, said Thomas, had accepted of a proposition from James Crawford, esq., (associated at law partner with said defendant, and counsel for him in this case,) to make an agreed statement of the facts involved, instead of the testimony taken on the hearing in the court below, he therefore applied to the said James Crawford to know if they, (said Davis and Crawford) had made out a statement of the facts, as agreed upon by said Crawford and Thomas, as they understood them, for the consideration of the counsel for the plaintiff. He informed him they had not, and gave as a reason why they had not, that from conversation with said Thomas, they were satisfied "they" meaning Messrs. Davis & Crawford, and the said Thomas could not agree upon a statement of facts, from some remarks made by said Thomas in relation to the facts connected with this case; but what those remarks were, they, said Davis & Crawford, did not inform this deponent. The conversa ton of this deponent with the said James Crawford was some time about the month of March last past, as near as he can now recollect. And further this deponent saith not.

THOMAS ROGERS.

Subscribed and sworn to before me, this 6th day of May, 1843.

W. LEWIS, *Clerk D. C.*

Endorsed, filed May 10, 1843.

Teste: GEO. S. HAMPTON, *C. S. C.*

Affidavit of A. Thomas, esq.

IOWA TERRITORY, *Johnson county, ss:*

B. RUSH PETRIKIN, assignee of E. M. Bissell, &c.
vs.
TIMOTHY DAVIS, assignee, &c.

Personally appeared before me, Avery Thomas, who being duly sworn says, that he is counsel for the plaintiff in this cause; that the testimony of Elijah M. Bissell and James Crawford was taken orally in open court in the hearing of this cause below; that soon after the appeal herein, and before the commencement of the term of this court in January last past, he made out a statement of the testimony of said Bissell, as near as he could recollect it, (which said statement or me-

morandum is appended to this affidavit, marked A,) and presented the same to James Crawford, esq., who is law partner of said defendant, and counsel for him in this cause, for his consideration. At the same time, stating that he, said Crawford, would remember what his own testimony was more distinctly than this deponent, and requested him to reduce it to writing; upon the examination of said statement, Mr. Crawford observed, that he could not say but that was the testimony of Mr. Bissell, but that it was not in accordance with the facts in the case, and therefore he could not accede to the same. This deponent then requested him, said Crawford, to make out a written statement of his own testimony, as also of that of Mr. Bissell; to this proposition he replied, that he could not do that, but was willing to throw aside the testimony entirely, and substitute a written statement of the facts, as they actually occurred, instead thereof; to which proposition this deponent acceded, and requested that he, said Crawford, would prepare a written statement of facts for the consideration of this deponent, as his associate counsel, as soon as convenient, so as to have the cause prepared for hearing at the next term of this court, (to wit, last January term;) to which request Mr. Crawford replied, he would converse with Mr. Davis, and prepare the statement, so that the facts might be settled before the term; not having received any statement from the Messrs. Davis and Crawford, this deponent called upon Mr. Crawford about a week previous to said term, as well as he now recollects, and asked him why he had not furnished the statement of facts as agreed upon; he replied, that he had conversed with Mr. Davis on the subject, and that he, Davis, was perfectly willing to settle the matter as to the facts in that mode; but that as he, Davis, was more immediately the party concerned, he preferred he should manage the matter; to which this deponent replied, that it was perfectly immaterial to him how it was brought about, provided the facts could be settled previous to the term of this court.

This deponent had no further communication on the subject with Messrs. Davis and Crawford before the term of said court; on the last day of said term, said cause was called up for final disposition, when Mr. Davis stated that said cause was not ready for argument at that time, and that it might be passed as "we" (meaning the parties or their counsel,) could settle all preliminaries, or words to that effect, (as near as this deponent recollects,) and have it ready for the adjourned term; soon after returning to Dubuque, this deponent against requested the said defendant that he would make a statement of the facts in the case, as he, said deponent, was anxious to prepare his written argument in time for the adjourned term; to which request he, said defendant, replied, after some hesitation, that he would in a short time, or words to that effect; since which time this deponent has had no farther communication with the Messrs. Davis and Crawford, or either of them, on the subject.

And he would further state, that as deponent verily believes the testimony adduced on the hearing in the court below *are* material to the

interest of the plaintiff in this cause, and that he cannot safely proceed to a final adjudication thereon without such testimony, not only the testimony of the said Bissell, but also of the said Crawford; and further he saith not.

A. THOMAS.

Subscribed and sworn to before me, this 10 May, 1843.

Teste: GEO. S. HAMPTON, *C. S. C.*

E. M. Bissell's statement.

District court in and for said county, May term, A. D. 1842.

IOWA TERRITORY, *Dubuque county, ss:*

BENJAMIN R. PETRIKIN, assignee of E. M. Bissell. vs. TIMOTHY DAVIS, assignee, &c. } In chancery.

The following is the substance of the testimony of Elijah M. Bissell, on the hearing of this cause before his honor Thomas S. Wilson, judge of the 3rd judicial district, in the May term of said court, A. D. 1842.

Elijah M. Bissell swore, that the assignment of August 2nd, A. D. 1841, was commenced Sunday evening, August 1st, 1841, and completed in the course of the night, and the object was to prevent an attachment being levied on his property, in favor of Isaac Burnet, of St. Louis, Missouri, which he understood was to be taken out early Monday morning, 2nd August, 1842; said Bissell applied to Timothy Davis to have him *receipt* the property, in case an attachment should be levied at the suit of said Burnet; that said Davis advised him, (said Bissell,) to execute the assignment in question, and upon such advice it was made Sunday before midnight, and executed immediately after midnight (or 12 o'clock) on Monday morning; he (said Davis) stating at the time that said assignment could be revoked at any time by paying or securing those who had accepted it; that about the middle of August, 1841, Bissell went east, expecting to get assistance to pay the claims of those who had accepted it; that failing to procure such assistance, he wrote a note to Mr. Davis from the east, to have him collect enough of the debts to pay off those who had accepted. Said Bissell returned on or about the 1st of November, A. D. 1841. That at several times Mr. Davis admitted to Bissell that he (Davis) was not liable under the assignment, any further than the same was accepted by the creditors. That in November Mr. Davis said to him, Bissell, that he (Davis) was afraid he (Bissell) would have to take the benefit of the bankrupt law; Bissell replied he hoped not, but if he did so conclude, he wanted as little done under the assignment to him as possible. Afterwards, about the last of January or first of February, A. D. 1842, Bissell informed Mr. Davis that he (Bissell) did not wish him (Davis) to proceed any farther under the assignment to him; that he (Davis) then had in his hands a larger amount of good notes than was necessary to pay the demands of those who had accepted of the assignment.

That from that time, until the said Davis broke into the store, he, Bissell, had possession of the key to the safe and store, and also all the papers, books, and property, except the notes of J. P. Evans and the note of George W. Jones. And that upon the said Davis demanding the possession of the store and the keys, he, said Bissell, refused to deliver them up, on the ground that said assignment to him, said Davis, was revoked. And that he had always had possession of the property at the dwelling house and barn.

Endorsed, filed May 10, 1843.

Teste: GEO. S. HAMPTON, *C. S. C.*

And afterwards, to wit, at a supreme court continued and held in and for Iowa Territory, at Iowa city, on the 10th day of May A. D. 1843.

Submitted to the court.

This day this cause came up for hearing, and the court having heard the arguments of counsel on both sides, took the same under advisement.

And afterwards, to wit, at a supreme court continued and held as aforesaid, on the 5th day of January, A. D. 1844.

Opinion of the supreme court.

This day came the parties aforesaid, by their solicitors, and this cause now coming on for further hearing, and the court being now sufficiently advised [of] and concerning the premises, delivered an opinion affirming the decree of the court below, to wit: It is a matter of considerable importance, to determine, in the first place, what proceeding actually took place in this cause in the court below. The defendant states, that the cause was brought to a hearing on petition and answer, and therefore, under our statute, the answer is to be taken as true on all points. The complainant does not controvert this statement directly, but resists that the case was heard on petition and answer, *with accompanying testimony;* that this was parol, and inasmuch as it has not been transmitted to this court, the case must be sent back for a new trial.

The transcript of the record contains no replication, but states in *an* entry that "the court being sufficiently advised concerning the matters and things contained in the petition and answer in this cause, and *of the testimony given in the case on the trial, do find, &c.*" From this it would certainly appear that evidence was given on the trial, and the natural inference is, that it was parol evidence.

The chancery act, section 18, provides, that "if the plaintiff do not file his replication, or exceptions, within the time fixed by the rules of the court aforesaid, the cause shall stand for a hearing on petition and answer;" section 28 of the same act, reads as follows: "If the complainant proceeds to a hearing on petition and answer only, the answer shall be taken to be true on all points, and no evidence shall be received to contradict the same, unless it be matter of record to which the answer refers, and is proveable by the said records." I therefore conclude, that the cause was brought to a hearing on petition and answer, and that if parol evidence was given at the trial, it was illegally given; the

cause ought not therefore to be sent back on account of the omission to send up illegal testimony, and the answer of the defendant must be taken as true throughout.

The case will then turn upon the validity of the assignment from Bissell to Davis. It is said that only one of these deeds has ever been recorded. I find no evidence to support this assertion; but, even if true, it seems to me immaterial. An actual transfer of the personal property seems to have taken place, sufficient to dispense with the necessity of recording the deed of assignment; nor was the recording of the deed more material in respect to the real estate, so far as this case is concerned. The law vested in the complainant in this case only the property possessed by Bissell at the time of filing his petition in bankruptcy. That which he had previously sold was not his, and although the law would have protected a subsequent purchaser for a valuable consideration, this principle does not extend to liens and transfers created by operation of law; had the assignee in bankruptcy taken possession of and sold the real estate, to some person unacquainted with the conveyance to Davis, and before the deed of the latter had been recorded, the purchaser under such a sale would have held the property. The case is parallel to that of a judgment lien, which would not take priority of a previous unrecorded deed, though a bona fide sale under such a judgment would have done so. Similar remarks are applicable to the objection that no schedule accompanies the assignment; I see no evidence of the fact; and even if true, the absence of this would only be a circumstance going to show that the transaction had not been bona fide; such a conclusion being rebutted by the answer, the absence of the schedule becomes unimportant.

The point is made in the argument as to whether an assignment by in insolvent is valid, when made to give preferences to a portion of the creditors; such is doubtless the case. 2nd Kent's Com., 532; 2nd Story's Com., 302. An insolvent may legally prefer one or more of his creditors; unable to perform his engagements to all, (in the absence of a bankrupt law,) he is permitted to select from among his creditors, all equally meritorious, those whom he will pay to the exclusion of the others.

The assignment in this case was made, not only before the bankrupt law took effect, but before its passage, and could not therefore be affected by it.

It is further contended that the assignment is void, because made ostensibly for the benefit of the creditors generally, but in fact for only a portion thereof; the assignment purports to be made "in trust for the benefit of the creditors of the said Elijah M. Bissell, in manner herein mentioned." This is certainly not "for the benefit of the creditors generally," but is qualified by the subsequent provisions of the assignment.

Another question arises out of the fact, that many of those for whose benefit the assignment was made, had not manifested their assent thereto prior to the filing of Bissell's bankrupt petition; some have not yet done

so; a portion of the number had however assented to the assignment in time; as to them at least it will be valid; and when, instead of endeavoring to set aside the whole transaction as fraudulent, the assignee contests the rights of particular individuals under the assignment, a very different question from the present will present itself. But it is said the consideration money, expressed in the assignment, is wholly inadequate; had the assignment been to Davis, for his own benefit, the objection would have had weight; but he is a mere instrument in the transaction—the medium through which the interest passes from Bissell to his creditors. The actual consideration for these assignments was the debts due to those in whose favor these assignments were made; there is nothing to show the inadequacy of this consideration.

It is further urged that Bissell has revoked the power conferred on Davis; had this been a mere naked power, he would clearly have had the right of revocation, which he afterwards, undoubtedly, attempted to exercise; but the instrument in this case was an assignment of property through Davis, not the mere conferring of a naked power upon him; before Davis had in any way notified the persons for whose benefit the assignment had been made, it might have been revoked; but after such notification, after several of the number had not only manifested their assent, but even signed the deed of assignment, after the trust is to a considerable extent executed, the right of revocation has certainly passed away from Bissell.

It is also objected that Davis, the assignee, has departed from the power conferred upon him by selling a portion of the property on credit, instead of for ready cash; if this were a deviation from his duty it would hardly invalidate the assignment; the parties really interested in the matter ought not to be prejudiced by an act of this nature, performed by the assignee selected by Bissell himself. But the assignee was not bound to sell for ready cash; he was only required to convert the property into money, within such convenient time as to him should seem meet. I see in this no prohibition to his selling on a reasonable credit.

Much stress is laid in the argument upon the fact, that the assignment was made for the purpose of delaying a creditor by preventing the levying of an attachment. The only answer which I think can successfully be made to this objection is, that no evidence of the fact *itself can be found* in the papers of the case.

There are a few other points of minor consequence, raised in the very elaborate argument of the counsel for the appellant; I deem it hardly necessary to reply to them all. As I see nothing in them which I think should cause a reversal of the decision below, I therefore think the decree of the district court in this case should be affirmed."

It is therefore ordered and decreed by the court, that the decree of the court below be affirmed; and that a writ of procedendo issue to the court below accordingly; and it is further decreed and ordered by the court, that the complainant pay to the defendant the costs herein expended in this court, and that an execution issue for the same.

And thereupon the said complainant gave notice of his intention of

appealing from the decree of this court to the Supreme Court of the United States.

Appeal prayed.

And afterwards, to wit, on the 30th day of January, A. D. 1844, the solicitor for said complainant filed in the clerk's office of the Supreme Court the following certificate, affidavit, and appeal bond, to wit:

Certificate of clerk of the district court.

TERRITORY OF IOWA, *Dubuque county, ss:*

I, Warner Lewis, clerk of the district court of the United States, for the county of Dubuque, and territory aforesaid, do hereby certify, that Benjamin R. Petrikin, the former assignee of Elijah M. Bissell, (who was declared a bankrupt by said court,) resigned his office as assignee as aforesaid, on the 1st day of August, A. D. 1843, and that said court appointed Benjamin Rupert, assignee of said bankrupt, on the day aforesaid, and that said Rupert has filed his bond as such in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Dubuque, this 20th day of January, A. D. 1844.

[SEAL.]

WARNER LEWIS,
Cl'k dist. court, D. C. I. T.

Endorsed.—Filed in my office January 30th, 1844.

Teste: GEO. S. HAMPTON,
C. S. C. I. T.

Affidavit of complainant.

IOWA TERRITORY, *Dubuque county, ss:*

Personally appeared before me, Warner Lewis, clerk of the district court in and for said county, Benjamin Rupert, to me well known, who being duly sworn says, that he was appointed assignee of Elijah M. Bissell, a bankrupt under the law of Congress, approved 19th August, A. D. 1841, entitled "an act to establish a uniform system of bankruptcy throughout the United States; that upon the decree of bankruptcy, made in the case of said Bissell, one Benjamin Rush Petrikin was appointed assignee of his estate and effects; that as such he, said Petrikin, commenced an action against one Timothy Davis, by filing a bill in chancery against said Davis to recover certain property alleged to be detained by him, belonging to the estate of said bankrupt; that said Petrikin appealed from the decision of the district court of said county to the supreme court of said territory; the above facts are upon the information and belief of this deponent; that at a court of bankruptcy, held in and for said county at Chambers by the judge of the district court of said county, in August last, as appears of record, the said Petrikin was, upon his application, discharged from his office of assignee, and this deponent was appointed assignee of said Bissell in his stead, as also appears of record; that at the last term of the supreme court of said territory, as this

deponent is informed and believes, the said court affirmed the decision of the district court "dismissing the bill of complaint of the said complainant;" and this deponent being advised by his counsel, and verily believing that the decision of the supreme court aforesaid is erroneous, and manifestly wrong, and being desirous of obtaining the adjudication of the Supreme Court of the United States, would state, that the amount in controversy in this case, exclusive of costs, exceeds the sum of one thousand dollars, as this deponent verily believes, and as appears of record in the case. And further this deponent saith not.

BENJAMIN RUPERT.

Sworn and subscribed to before me, this 19th January, 1844.

W. LEWIS, *C'k D. C.*

TERRITORY OF IOWA, *Dubuque county, ss:*

Personally appeared before me, Warner Lewis, clerk of the district court of said county, Benjamin Rupert, whose signature appears to the foregoing affidavit, and upon his solemn oath says, that the same is true according to the best of his belief.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Dubuque, this 20th day of January, A. D. 1844.

WARNER LEWIS, *Clerk D. C.*

Endorsed, filed in my office, 30th January, 1844.

Test: GEO. S. HAMPTON, *C. S. C.*

And afterwards, to wit, at a supreme court continued and held at the capitol in Iowa city, in and for Iowa territory, on the 13th day of January, A. D. 1846.

And now on this day comes the complainant, and suggests to the court, that the clerk of this court did not enter of record the prayer of the complainant for an appeal to the Supreme Court of the United States, and the allowance of said appeal by the court.

Order granting appeal entered "nunc pro tunc."

Now therefore, upon motion, it is ordered and decreed by the court, that said prayer and the allowance thereof be entered "*nunc pro tunc*" for the January term, A. D. 1844, to wit:

Appeal granted.

This day came the parties aforesaid by their solicitors, and on motion of said complainant, an appeal is granted him to the Supreme Court of the United States, from the decree of this court, affirming the decree rendered in this cause in the district court of Dubuque county, upon the said complainant executing bond to said defendant, with good security, in the penalty of two hundred dollars, conditioned according to law.

And afterwards, to wit, on the 14th day of January, 1846, the said complainant filed the following appeal bond herein, to wit:

Appeal bond.

Know all men by these presents, that we, Benjamin Rupert, assignee of E. M. Bissell, bankrupt, and Abraham Cline, are held and firmly bound unto Timothy Davis in the full and just sum of two hundred dollars, to be paid to the said Timothy Davis, or his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this twenty-first day of January, in the year of our Lord one thousand eight hundred and forty-four.

Whereas lately, at a supreme court of the territory of Iowa, in a suit depending in said court, between Benjamin Rupert, assignee of E. M. Bissell, in bankruptcy, and Timothy Davis, judgment was rendered against the said Benjamin Rupert, assignee, etc., and the said Benjamin Rupert, assignee, etc., having obtained an order for appeal, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Timothy Davis, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next.

Now, the condition of the above obligation is such, that if the said Benjamin Rupert, assignee of E. M. Bissell, in bankruptcy, shall prosecute *said judgment* to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

BENJ. RUPERT, [SEAL.]
Assignee of E. M. Bissell, bankrupt.
A. CLINE. [SEAL.]

Sealed and delivered in presence of—
C. J. LANSING,
L. A. THOMAS.

Approved by T. S. WILSON, *Judge Sup. court.*

Endorsed, filed January 14, 1846.
Test: GEO. S. HAMPTON, *C. S. C.*

UNITED STATES OF AMERICA, *Territory of Iowa, ss:*

I, George S. Hampton, clerk of the Supreme court in and for the territory aforesaid, do hereby certify, that the foregoing seventy-one and a half pages, hereto attached, contains a full, true, and complete copy of the record and proceedings had therein between the parties therein named, as full, true, and complete as the same remains of record or on file in my office.

In testimony whereof, I have hereunto set my name and affixed the [L. S.] seal of the said supreme court hereunto, this 17th day of January, 1846.

GEO. S. HAMPTON, *Clerk S. C. I. Ty.*